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In the Supreme Court of the United States

OCTOBER TERM, 1983

THE PEOPLE OF THE
STATE OF NEW YORK, PETITIONER

v.

BENJAMIN QUARLES

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether *Miranda* warnings must be given before questioning that is incident to an arrest.

2. Whether nontestimonial evidence derived from an interrogation that violates *Miranda* is admissible in a criminal prosecution.

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INTEREST OF THE UNITED STATES

In our view, the principal question in this case is whether the requirements of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), apply to questioning by law enforcement officers that is incident to the arrest of a suspect. The resolution of that question is likely to have a significant impact on the practices of the agencies responsible for enforcing federal criminal laws and on federal criminal law enforcement interests. This case also presents a question concerning the scope of the exclusionary rule established by *Miranda*. Because the resolution of that question will affect the extent to which probative evidence can be used to establish guilt in criminal prosecutions, it is also likely to affect federal criminal law enforcement.

STATEMENT

1. Two police officers on patrol in New York City were approached by a woman who said she had just been raped. She described her assailant as a black man six feet tall

who was wearing a short black jacket with the words "Big Ben" in yellow letters on the back, and she said that the man had gone into a nearby supermarket. She also said that the man had a gun. Pet. App. 2a-3a.

One of the officers called for assistance while the other, Officer Kraft, went to the door of the supermarket. He saw respondent, who matched the woman's description, approaching a checkout counter. Respondent saw Officer Kraft seconds later and fled toward the back of the store, with Officer Kraft in pursuit. Officer Kraft lost sight of respondent for a few seconds but soon located him again, caught up to him, and ordered him to stop and put his hands over his head. By this time, other officers were on the scene and at least four officers surrounded respondent with their guns drawn. Pet. App. 3a; J.A. 17a.

Officer Kraft frisked respondent and discovered that he was wearing an empty shoulder holster. The officer then handcuffed respondent and said to him: "Where is the gun?" Respondent looked toward some cartons nearby and said: "The gun is over there." Officer Kraft looked through the cartons briefly and found a loaded .38 caliber revolver. Officer Kraft testified that at the time respondent made the statement indicating the location of the gun, the other officers no longer had their weapons drawn. Pet. App. 3a; J.A. 18a, 34a-36a.

After securing respondent's gun, Officer Kraft told respondent he was under arrest and read him the warnings required by *Miranda* v. *Arizona*, 384 U.S. 436 (1966). Respondent said that he would be willing to answer questions without an attorney present. Officer Kraft asked respondent if he owned the gun, and respondent said that he did; he asked respondent where he had bought it, and respondent said "Miami, Florida." Pet. App. 3a; J.A. 20a-21a.

2. Respondent was indicted for illegal possession of a weapon. Before trial, he moved to suppress the gun and all of his statements to Officer Kraft. The trial court, after holding a hearing, granted the motion. Pet. App. 2a-5a. The court held that the statement identifying the

location of the gun had to be suppressed because at the time respondent made that statement he was "in custody or arrested within the meaning of *Miranda*" (*id.* at 4a) and was not given the warnings required by that case. The court then asserted that the gun was to be suppressed as the fruit of the statement and held that the statements made after respondent received *Miranda* warnings were "tainted by the previous seizure of the weapon and the statement [made] without the warnings" (*id.* at 5a).

By a vote of 4-3, the New York Court of Appeals affirmed. Pet. App. 6a-14a.[1] The Court of Appeals agreed with the trial court that respondent's "response to the police interrogation occurred while he was in custody, before he had been given the pre-interrogation warnings to which he was constitutionally entitled" (*id.* at 7a). The Court of Appeals also affirmed, without discussion, the suppression of the gun and respondent's other statements as the fruit of respondent's initial statement. *Ibid.* The court asserted that "there is no evidence * * * that there were exigent circumstances posing a risk to public safety or that the police interrogation was prompted by any such concern" and that it therefore would not decide whether "an emergency exception" to what it saw as the requirements of *Miranda* "might be recognized if the purpose of the police inquiry had been to locate and to confiscate the gun for the protection of the public as distinguished from the[] desire to obtain evidence of criminal activity on the part of [respondent.]" *Ibid.*

Judge Wachtler dissented. He stated that the officers had "responded to an emergency situation in an entirely reasonable manner" (Pet. App. 9a). Judge Wachtler reasoned that *Miranda* and other decisions regulating custodial interrogation are "primarily concerned with discouraging official conduct which, examined objectively, reveals an unmistakably deliberate attempt to elicit some incriminating response from the detainee as opposed to official

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[1] An intermediate appellate court had affirmed the trial court's ruling without opinion. See Pet. App. 10a.

conduct designed to achieve an articulable and legitimate non-investigatory purpose." *Id.* at 11a. In this case, the dissenters explained, "[f]ar from revealing a deliberate design on the part of the officer to elicit an incriminating statement from [respondent], the record * * * portrays a prudent measure undertaken to neutralize the very real threat of possible physical harm which could result from a weapon being at large." *Id.* at 13a-14a.

Judge Wachtler further stated that "[t]o require a police officer to provide *Miranda* warnings before asking about the location of a weapon under the circumstances of this case would only unnecessarily enhance the potential for death or severe injury" (Pet. App. 13a). He reasoned that "the loaded weapon here could have been passed to a cohort, an accomplice bent on securing the freedom of his captured ally, or, worse yet, dropped on the street outside the supermarket to become the weapon of an innocent child, a mentally unstable adult, or anyone else who might decide to use it." *Ibid.* For these reasons, Judge Wachtler concluded, "[a]ny result which discourages the police from pursuing this type of precautionary measure by requiring *Miranda* warnings beforehand * * * is contrary to reason" (*id.* at 14a).

SUMMARY OF ARGUMENT

I. Officer Kraft's question about the location of the gun is properly viewed as incident to the arrest of respondent. The process of arresting a suspect—which can be distinguished, with reasonable clarity, from subsequent investigative efforts to obtain statements from the suspect for use as evidence against him—is clearly not complete when the suspect is placed under restraint. As the Court has recognized in cases dealing with searches incident to arrest, the process of arresting a suspect must also include, among other things, ensuring that any weapons to which the suspect might have access cannot be used to harm the arresting officers or frustrate the arrest.

We submit that *Miranda* warnings need not be given before questioning that is incident to an arrest, even if the questioning could produce an inculpatory response. See *Rhode Island* v. *Innis*, 446 U.S. 291, 301 (1980) (*Miranda* warnings need not accompany "words or actions * * * normally attendant to arrest and custody"). We recognize that the *Miranda* rules should be kept relatively clear and easy to apply, but the distinction between actions incident to arrest and subsequent investigatory actions is familiar from the Fourth Amendment context, and it is, if anything, less difficult to apply than other distinctions law enforcement officers currently use in deciding whether *Miranda* warnings must be given.

The Court of Appeals apparently believed that Officer Kraft had to warn respondent because respondent was "in custody." It is true that respondent was in custody in the sense that he had been seized within the meaning of the Fourth Amendment, but a Fourth Amendment seizure should not be equated with "custody" as *Miranda* uses that term. A Fourth Amendment seizure, while a necessary condition of requiring *Miranda* warnings, is not a sufficient reason to require warnings. *Miranda* was concerned with the kind of "custody" that compels suspects to speak, and not every form of custody has that effect. In particular, questioning incident to an arrest does not present the dangers of coercion that *Miranda* warnings are designed to dispel, because an arrest scene in the few moments following an arrest does not resemble the "interrogation environment"—in which persistent, psychologically coercive questioning can compel a suspect to speak—for which *Miranda* warnings are designed.

Specifically, a principal cause of the psychological coercion that concerned the *Miranda* Court is a suspect's perception that interrogation will persist indefinitely until he satisfies his interrogator. Questioning incident to an arrest conveys no such message to a suspect; such questioning will necessarily be brief, and it will concern subjects that the arresting officer obviously is seeking to resolve quickly for his own safety or because he wishes to

complete the arrest successfully. Similarly, *Miranda* was concerned with the impact of an environment that the interrogating officers could manipulate to compel a suspect to speak; arresting officers will seldom have that degree of control over the scene of an arrest. Of course, the fact of being arrested might itself prompt a suspect to speak. But the Self-Incrimination Clause bars only compulsion, not every official act that may produce an incriminating admission. Nothing in the Constitution requires officers to discourage impulsive or improvident statements, so long as they are made voluntarily.

We recognize that, amid the show of force that often accompanies an arrest, a suspect will sometimes be coerced into speaking. But the *Miranda* rules are not the appropriate remedy for such coercion. *Miranda* warnings were designed to dispel the coercion that can be generated by prolonged incommunicado interrogation; they will not generally be useful in preventing coercion of the kind that is likely to arise at an arrest scene. That kind of coercion can be dealt with by the traditional inquiry into the voluntariness of the statement. Moreover, events at an arrest scene will be relatively easy to reconstruct; as the *Miranda* Court emphasized, a principal reason for the *Miranda* exclusionary rule is the difficulty of determining what occurred during a prolonged and manipulative incommunicado interrogation.

Miranda established a presumption, rebuttable only by a showing that a suspect waived his rights after proper warnings, that questioning in certain custodial circumstances is coercive. But such a presumption is unreasonable and unjustified in contexts where there is little danger of unprovable coercion of the kind identified by *Miranda*. The costs of applying *Miranda* to questioning incident to an arrest are substantial: probative statements that were in fact voluntarily given will be suppressed; suspects will be discouraged from speaking voluntarily; and police officers may be forced to choose between jeopardizing the successful completion of an arrest and jeopardizing the admission of probative evidence. The

slight possible benefits to the values underlying the Self-Incrimination Clause that might be gained from applying *Miranda* to questioning incident to an arrest do not warrant incurring these costs.

II. Even if *Miranda* requires the suppression of respondent's statement identifying the location of the gun, it does not follow that the State cannot introduce the gun itself, assuming it can independently link it to respondent.

The Court has not resolved the question whether nontestimonial fruits of a *Miranda* violation may be used as evidence. By its terms, the Self-Incrimination Clause applies only to compelled statements, not to nontestimonial evidence. When nontestimonial evidence is the fruit of statements that are not shown to have been compelled, but are excluded only because they were obtained in violation of the prophylactic rule of *Miranda*, the possibility that the nontestimonial evidence derived from a compelled statement is too remote to warrant its exclusion. Moreover, the specific values that this Court has identified as the basis of the privilege against self-incrimination are not served by excluding such evidence.

In addition, evidence that is derived from a *Miranda* violation, but would have been discovered by the authorities, even in the absence of a *Miranda* violation, should not be excluded. In this case, it seems clear that the gun would inevitably have been discovered by the officers even if respondent had not made his statement.

ARGUMENT

I. *MIRANDA* WARNINGS NEED NOT BE GIVEN BEFORE QUESTIONING THAT IS INCIDENT TO AN ARREST

Officer Kraft's actions were manifestly reasonable; surely few police officers in his situation would—or should—have stopped to give *Miranda* warnings before asking respondent where the gun was. As the dissenting opinion in the Court of Appeals pointed out, to do so might have

endangered the officers themselves or innocent bystanders. Nor is there any suggestion that Officer Kraft's questioning was threatening, abusive, or oppressive in any way.

The Court of Appeals nonetheless ordered that the evidence obtained as a result of Officer Kraft's question be suppressed. The only constitutional provision underlying the court's holding is the Self-Incrimination Clause of the Fifth Amendment, but the Court of Appeals did not suggest that respondent's statement was in fact coerced or compelled in a way that the Self-Incrimination Clause forbids. That is, the court did not suggest that the Self-Incrimination Clause, of its own force, forbade the use of the statement respondent made in response to Officer Kraft's reasonable and legitimate question. Instead, the court suppressed respondent's statement because, it believed, Officer Kraft did not comply with the "prophylactic standards" established by *Miranda* (*Michigan* v. *Tucker*, 417 U.S. 433, 446 (1974))—standards that are "not themselves rights protected by the Constitution" (*id.* at 444) but are intended to safeguard a suspect's rights under the Self-Incrimination Clause.

It is the nature of the *Miranda* prophylactic rules that sometimes, in particular cases, they will require the suppression of statements that are not in fact "compelled" within the meaning of the Self-Incrimination Clause. See *Michigan* v. *Tucker*, *supra*, 417 U.S. at 445-447; *Michigan* v. *Payne*, 412 U.S. 47, 53 (1973); *Johnson* v. *New Jersey*, 384 U.S. 719, 730 (1966); *Miranda*, 384 U.S. at 457. The importance of having a relatively clear and definite rule, and the difficulty of detecting every instance of compulsion on a case-by-case basis, are thought to justify such a result. But if the *Miranda* rules can be defined in a way that, while not materially diminishing their clarity or reducing the protection they afford to constitutional values, also does not produce anomalous results that damage important societal interests, such a construction is obviously preferable.

In our view, the Court of Appeals erred in assuming that *Miranda* required warnings to accompany all ques-

tioning that occurred after respondent was surrounded by police officers. In *Rhode Island* v. *Innis*, 446 U.S. 291 (1980), the Court took care to specify that *Miranda* warnings are not required before the police utter words or take actions "normally attendant to arrest and custody" (*id.* at 301). We submit that questions that are asked incident to the arrest of a suspect do not constitute interrogation of a kind to which *Miranda* applies. We do not suggest, of course, that all questions asked at the scene of an arrest should be regarded as incident to the arrest. See *Orozco* v. *Texas*, 394 U.S. 324 (1969). Rather, arresting a suspect is a discrete process, relatively easy to distinguish from subsequent efforts to gather testimonial evidence from the suspect. When questions are asked as a legitimate part of the process of completing an arrest, the dangers of coercion with which *Miranda* was concerned are ordinarily not likely to be present. For that reason, such qustions need not be preceded by *Miranda* warnings.

A. A Question, Asked at the Scene of the Arrest and Shortly After the Arrest, About the Location of a Weapon Recently Possessed by the Suspect, Belongs to a Definable Category of Questions That Are Part of the Process of Completing an Arrest

1. The process of arresting a suspect consists of more than the act of placing him under restraint. While we readily acknowledge that respondent's freedom of movement had been restricted when Officer Kraft asked him the location of the gun, it is equally obvious that the process of arresting respondent was not complete at that time. It would have been wholly unrealistic, indeed dangerous, for the officers to have concluded otherwise.

At the very least, the process of arresting a suspect includes measures designed to place the situation at the arrest scene under control, and to ensure that safety of the arresting officers or bystanders will not be threatened and the suspect will not escape. Specifically, as this Court has recognized in dealing with searches incident to ar-

rest, the process of arresting a suspect necessarily comprises steps that are needed "in order to remove any weapons that the [suspect] might seek to use in order to resist arrest or effect his escape" because "[o]therwise, the officer's safety might well be endangered, and the arrest itself frustrated." *Chimel* v. *California*, 395 U.S. 752, 763 (1969).

For this reason, Officer Kraft's question was part of the process of arresting respondent. Officer Kraft had abundant reason to believe that respondent had recently disposed of, or hidden, a gun. As Judge Wachtler pointed out, the gun could have been used to threaten the officers or to aid in an escape attempt. Asking respondent the location of the gun was the most obvious and direct way of ascertaining its location and ensuring that it could not interfere with the arrest or endanger other persons; it also achieved those objectives far more quickly, and with less danger, than any other action that the officers might have taken—such as attempting to search both respondent's person and the surrounding area.

Other questions, besides those designed to determine the location of a weapon, might also be reasonable incidents of an arrest. For example, if the arresting officers in this case believed that respondent had an armed accomplice nearby, a question designed to help find the accomplice would have been as much a part of successfully completing the arrest, and controlling the situation, as a question about the location of a weapon. It is also a reasonable and necessary part of an arrest to ensure that the right person has been apprehended, and arresting officers might ask questions designed to confirm the suspect's identity after they have arrested him on probable cause. In addition, the Court has recognized that securing evidence from the arrest scene that might otherwise be destroyed is part of the process of arresting a suspect (see *Chimel* v. *California*, *supra*, 395 U.S. at 763), and questions de-

signed to ascertain the location of such evidence should be regarded as incident to the arrest.[2]

In general, questioning incident to an arrest can be defined by its subject matter as well as by the time and place at which it occurs. Like a search incident to arrest, it must be roughly contemporaneous with the arrest. See, *e.g.*, *Vale* v. *Louisiana*, 399 U.S. 30, 33 (1970). In subject matter, it must be confined to questions reasonably related to the successful completion of the process of arresting the suspect and placing the arrest scene under control.

2. It will not diminish the clarity of the *Miranda* rules to distinguish between questions asked incident to an arrest and questions asked as part of a subsequent investigative process. To begin with, the clarity of the *Miranda* rules as they are currently applied should not be overstated. *Miranda* warnings are not required unless a suspect is "in custody" (384 U.S. at 477), and—as more than one court of appeals has commented—defining "custody" for *Miranda* purposes has proved to be a difficult and slippery task. See, *e.g.*, *United States* v. *Harris*, 611 F.2d 170, 172 (6th Cir. 1979); *United States* v. *Jimenez*, 602 F.2d 139, 143 (7th Cir. 1979); *United States* v. *Hall*, 421 F.2d 540, 541 (2d Cir. 1969), cert. denied, 397 U.S. 990 (1970). There is no clear rule for determining when a suspect is "in custody"; courts have generally concluded that that question can be resolved only on a case-by-case basis by considering a range of circumstances. See, *e.g.*, *United States* v. *Harris*, *supra*, 611 F.2d at 172; *United States* v. *Jimenez*, *supra*, 602 F.2d at 143; *United States* v. *Kennedy*, 573 F.2d 657, 660 (9th Cir. 1978); *United States* v. *Del Soccorro Castro*, 573 F.2d 213, 215 (5th Cir. 1978); *Steigler* v. *Anderson*, 496 F.2d 793, 799-800 (3d Cir.), cert. denied, 419 U.S. 1002 (1974).

In addition, *Miranda* applies only when a suspect is interrogated, and the definition of interrogation—"any

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[2] Compare *Harryman* v. *Estelle*, 616 F.2d 870, 873-875 (5th Cir.) (en banc), cert. denied, 449 U.S. 860 (1980), with *United States* v. *Castellana*, 500 F.2d 325 (5th Cir. 1974) (en banc).

words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect" (*Rhode Island* v. *Innis*, *supra*, 446 U.S. at 301 (footnotes omitted))—is capable of varying application. Moreover, as that definition suggests, and as the courts of appeals have consistently held, custodial questioning need not be preceded by *Miranda* warnings if it is routine administrative questioning,[3] and disputes can arise over what constitutes routine administrative questioning.

The distinction between actions taken incident to arrest and post-arrest investigative actions is, if anything, easier to apply than these other distinctions that courts and law enforcement officers already use in deciding when *Miranda* warnings are to be given. In the Fourth Amendment area, law enforcement officers must distinguish between a search incident to arrest, which can be conducted without probable cause, and searches that require probable cause and possibly a warrant. Because of the Fourth Amendment exclusionary rule, a mistaken decision about whether a search is correctly characterized as incident to arrest can be fatal to a prosecution. But law enforcement officers apply the "incident to arrest" criterion routinely and without inordinate difficulty.

It is reasonable to expect that officers will have no greater difficulty distinguishing between questioning that is needed to complete an arrest and control the arrest scene, on the one hand, and post-arrest interrogation designed to elicit testimonial evidence from the accused, on

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[3] See, *e.g.*, *United States* v. *Glen-Archila*, 677 F.2d 809, 815 (11th Cir. 1982), cert. denied, No. 82-5178 (Oct. 4, 1982); *United States* v. *Prewitt*, 553 F.2d 1082, 1086 (7th Cir.), cert. denied, 434 U.S. 840 (1977); *United States* v. *Grant*, 549 F.2d 942, 946-947 (4th Cir.), cert. denied, 432 U.S. 908 (1977); *United States ex rel. Hines* v. *LaVallee*, 521 F.2d 1109, 1112-1113 (2d Cir. 1975), cert. denied, 423 U.S. 1090 (1976); *United States* v. *Menichino*, 497 F.2d 935, 939-941 (5th Cir. 1974); *United States* v. *LaMonica*, 472 F.2d 580 (9th Cir. 1972). See also *United States* v. *Hinckley*, 672 F.2d 115, 122-124 (D.C. Cir. 1982).

the other. The police skills involved in the two tasks—arresting a suspect and interrogating him—are significantly different. The police are likely to regard the tasks as quite distinct in the demands they make and the risks they pose. Notably, in this case, Officer Kraft intuitively distinguished between questioning incident to the arrest and the subsequent investigative questioning; he was careful to give *Miranda* warnings before he began the latter kind of questioning.

B. Questioning Incident to an Arrest Does Not Create the Dangers of Coercion With Which *Miranda* Is Concerned

1. a. The *Miranda* Court stated that warnings must accompany "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." 384 U.S. at 444. But the notion of "custody" has a different meaning in different contexts, and the fact that a suspect may be "in custody" for certain purposes does not necessarily mean that he is "in custody" for *Miranda* purposes. Nor is every restraint on a suspect's freedom of movement "significant" for *Miranda* purposes. Specifically, *Miranda* warnings should not be required in situations that, while "custodial" in some sense, do not present the dangers with which *Miranda* is concerned.

For example, a parolee is "in custody" for purposes of the habeas corpus statutes, 28 U.S.C. 2241 and 2254, and his "freedom of action" is significantly restrained. See *Jones* v. *Cunningham*, 371 U.S. 236, 242-243 (1963) ("[I]n fact, as well as in theory, [parole] * * * involve[s] significant restraints on [a parolee's] liberty * * *. [The] conditions and restrictions [of parole] * * * significantly restrain [the parolee's] liberty * * *. While petitioner's parole releases him from immediate physical imprisonment, it imposes conditions which significantly confine and restrain his freedom * * *."). But the fact that a suspect is on parole does not entitle him to *Miranda* warnings before he is questioned by the police,

even if the questioning is conducted at the request of the police and behind closed doors in a police station. *Oregon* v. *Mathiason*, 429 U.S. 492 (1977).

When Officer Kraft asked respondent the location of the weapon, respondent undoubtedly was "in custody" in the sense that he had been "seized" within the meaning of the Fourth Amendment. But the Fourth Amendment and the *Miranda* rules serve substantially different purposes. See *Brown* v. *Illinois*, 422 U.S. 590, 600-603 (1975). The Fourth Amendment defines the circumstances in which the police may restrain a person's movement at all; *Miranda* is concerned with the quite different problem of averting the "compulsion to speak" (384 U.S. at 461) that, the *Miranda* Court believed, might be created by certain forms of restraint. There is, therefore, simply no reason automatically to equate Fourth Amendment "custody"—that is, a seizure—with the kind of "custody" that makes *Miranda* warnings necessary.

b. *Miranda* was concerned with the kind of custody that is "inherently compelling" (384 U.S. at 467; see *id.* at 458, 465). The compulsion that *Miranda* warnings are designed to dispel is caused by the psychological forces, described in detail in the Court's opinion in *Miranda*, that arise in *certain* custodial settings. See 384 U.S. at 445 ("An understanding of the nature and setting of this in-custody interrogation is essential to our decision[]"). As the *Miranda* opinion makes clear, restraint of the suspect's liberty is necessary to permit these forces to operate, but it is not sufficient, and these forces do not begin to operate the moment a suspect is arrested. Rather, these psychological forces, the Court determined, arise in what the Court repeatedly referred to as an "interrogation environment" or an "interrogation atmosphere." See, *e.g.*, 384 U.S. at 457, 468. See also *Rhode Island* v. *Innis*, *supra*, 446 U.S. at 299. The *Miranda* Court's discussion of the "nature and setting" of the "interrogation atmosphere" shows that questioning incident to an arrest does not occur in such an environment.

Two elements are crucial to the creation of the atmosphere with which *Miranda* was concerned—the danger

that the suspect may perceive that questioning will not cease until he has satisfied his interrogators; and the isolation of the suspect and pervasive police domination and control of the surroundings. The suspect's perception that interrogation might continue indefinitely played a particularly large role in the compulsion that concerned the *Miranda* Court. Indeed, the Court explained that the principal reason for the warning of the right to remain silent is to overcome "an interrogator's imprecations, whether implied or expressly stated, that the interrogation will continue until a confession is obtained" (384 U.S. at 468). The Court described police techniques that strive to create " 'an oppressive atmosphere of dogged persistence' " in which the questioner " 'interrogate[s] steadily and without relent, leaving the subject no prospect of surcease * * * [and] no respite from the atmosphere of domination.' " 384 U.S. at 451 (citation omitted). Coercion is created, the *Miranda* Court explained, when "[p]atience and persistence, at times relentless questioning, are employed" (*id.* at 455) because officers can then use "psychological conditioning" and "deceptive stratagems" (*id.* at 454, 455) to coerce a suspect into speaking.

Crucial to the success of these tactics is the ability of the interrogating officers to manipulate the surroundings so as to further their efforts to break the suspect's will. The coercion that *Miranda* described arises in an "incommunicado police-dominated atmosphere" (384 U.S. at 456) that is "cut off from the outside world" (*id.* at 445; see *id.* at 475), "an interrogation environment * * * created for no purpose other than to subjugate the individual to the will of his examiner" (*id.* at 457).

When questioning is conducted only incident to an arrest, the psychological forces described by the *Miranda* opinion have no opportunity to operate. Such questioning is necessarily brief in duration, because the process of arresting a suspect seldom takes long to complete. The suspect will have no reason to believe that the questioning will persist until he incriminates himself, and the

police will be unable to take advantage of the psychological forces generated by prolonged and relentless questioning. Because the subject matter of questioning incident to arrest is confined to matters that a prudent officer would want to resolve before he considered the arrest complete, no suspect is likely to receive the impression that he is in the presence of a dogged interrogator who will persist until he receives the answer he is seeking.

In addition, questioning at the arrest scene will be most unlikely to take place in an environment deliberately designed and manipulated to coerce the suspect into speaking. Often, as in this case, the arresting officers will have no control whatever over the place in which they arrest a suspect. Where they have some control—if, for example, they go to a suspect's home to arrest him—they will seldom be able to arrange a setting, or create an environment, that serves their purposes to anything approaching the degree *Miranda* envisioned. To the extent the authorities do arrest a suspect in an environment they control completely, they are likely to be able to complete the arrest quickly and with little difficulty, thus diminishing or obviating the need to ask questions incident to the arrest.

We do not suggest that *Miranda* is limited to stationhouse interrogation and has no application to questioning at the arrest scene. See *Orozco* v. *Texas*, *supra*; *Mathis* v. *United States*, 391 U.S. 1 (1968). The reason *Miranda* cannot be so limited is apparent: officers could escape its dictates by, in effect, recreating the coercive aspects of the stationhouse environment at the arrest scene. That is arguably what the officers did in *Orozco*. But where arresting officers have not attempted to create a coercive "interrogation environment" at the arrest scene but have engaged only in brief, reasonable, incident-to-arrest questioning, the concerns that could justify the *Miranda* prophylactic rule are not present.

Of course, forces generated at the time of an arrest will often *induce* a suspect to speak to the police. A suspect's emotional reaction to being arrested may be that

he might as well cooperate since he has nothing more to lose. A person may operate outside the law as long as he can escape detection but become willing to cooperate when he is in the presence of the authorities. He may gain some emotional release from confessing. Or a suspect may, in the sudden rush of events, speak imprudently because he has not stopped to calculate the incriminating effect that his statement will have; that may be the most plausible explanation of respondent's statement in this case.

The Constitution does not, however, require that admissions made for any of these reasons be suppressed. Nor, of course, does the Constitution require officers to discourage suspects from making statements for these reasons. The Self-Incrimination Clause prohibits only *compulsion*, not every show of authority or official act that might induce a person to speak. "The Constitution does not prohibit every element which influences a criminal suspect to make incriminating admissions." *United States* v. *Washington*, 431 U.S. 181, 187 (1977); see *Rhode Island* v. *Innis*, *supra*, 446 U.S. at 303 (absent interrogation, authorities need not give *Miranda* warnings before engaging in "subtle compulsion" of a suspect in custody); *Oregon* v. *Mathiason*, *supra*, 429 U.S. at 495; *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 224 (1973). No constitutional value is offended by the use of a statement that a suspect has made imprudently, or in order to gain some emotional release, or because of a vague perception that he will be treated more leniently if he is cooperative (see *Michigan* v. *Mosley*, 423 U.S. 96, 102 (1975)).[4]

2. a. We recognize that, beyond inducing a suspect to speak voluntarily, an arrest might sometimes be conducted in a way that gives rise to the kind of coercion

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[4] Moreover, there is no requirement that the police give *Miranda* warnings in order to dispel any compulsion that might result from an arrest itself. See *Rhode Island* v. *Innis*, *supra*, 446 U.S. at 300. The authorities are free to arrest a suspect and permit the pressure generated by the arrest to cause him to volunteer a statement. *Ibid.*, quoting *Miranda*, 384 U.S. at 478.

that the Self-Incrimination Clause does forbid. The remedy for such potential coercion, however, is not to require *Miranda* warnings but to permit the suspect to attempt to show that his statement was involuntary in the traditional sense. See, *e.g.*, *United States* v. *Washington*, *supra*, 431 U.S. at 188, citing *Rogers* v. *Richmond*, 365 U.S. 534, 544 (1961) ("whether, considering the totality of circumstances, the free will of the [speaker] was overborne"). *Miranda* warnings are likely to be ineffective in preventing the kind of coercion that can arise at an arrest scene, and the *Miranda* exclusionary rule is not needed to avoid the difficulty of proving, in individual cases, that particular statements were the product of coercion.

A suspect might be coerced into speaking at the arrest scene, for example, if the arresting officers decide actually to threaten him with physical harm in order to compel him to speak. But *Miranda* warnings are likely to be useless to prevent this kind of coercion. If the officers who arrested respondent were determined to threaten him with physical harm in order to find out where the gun was, they could easily have recited *Miranda* warnings before making their threat; if respondent believed he was so threatened, he would scarcely have been reassured by those warnings, because he would correctly perceive that they were given only for the sake of appearances. His remedy would be to show that his statement was in fact coerced.

Moreover, when a suspect claims that arresting officers coerced him into answering questions that were asked incident to the arrest, a court should be perfectly able to determine—by traditional means and without indulging any empirically dubious presumptions—whether the incriminating answer was in fact compelled. *Miranda* emphasized that custodial interrogation of the kind with which it was concerned took place in private, shrouded with secrecy that made it very difficult for a court subsequently to reconstruct the events that occurred and the

psychological pressures they generated. See, *e.g.*, 384 U.S. at 445. By contrast, an arrest will, as we noted, generally occur either in public or in an environment familiar to the suspect. There is a reasonable likelihood that neutral witnesses, or witnesses favorable to the suspect, will be present. The encounter during which questioning can be regarded as incident to arrest will, as we explained, be brief and, compared with a lengthy, complex, and manipulative course of stationhouse interrogation, easy to reconstruct.

Miranda warnings, in short, are not an all-purpose prophylaxis for every form of police coercion; they are designed for persistent interrogation in a police-dominated "interrogation environment." They are not likely to be effective in preventing the relatively crude forms of coercion that are the principal danger at an arrest scene in the moments after a suspect is apprehended. Nor are the *Miranda* rules needed to detect such coercion.

b. In any event, the question is not whether *Miranda* warnings will ever be effective, or could possibly be effective, in preventing a suspect from being coerced into answering a question asked incident to an arrest. The operative principle of *Miranda* is that questioning in a certain environment is presumed to be coercive; the presumption can be overcome only if the government shows that the suspect has waived his rights after proper warnings. See, *e.g.*, 384 U.S. at 468-469, 474-476. In an incommunicado environment, dominated by officers who can conduct an interrogation of indefinite duration, this presumption is plausible. But as the Court has recognized, presumptions should not be extended beyond the context in which their empirical premises hold true. See, *e.g.*, *Leary* v. *United States*, 395 U.S. 6, 33-36 (1969); *Tot* v. *United States*, 319 U.S. 463, 467-468 (1943). "Given the severity of [the *Miranda*] presumption * * * —which may operate in the absence of any proof of [coercion] and thus may block a legitimate response to criminal conduct," that presumption should be indulged "only in cases

in which a reasonable likelihood of [coercion] exists" (*United States* v. *Goodwin*, No. 80-2195 (June 18, 1982), slip op. 4)). A brief questioning at the arrest scene, limited to matters reasonably incident to the arrest, does not present a sufficient likelihood of the kind of coercion with which *Miranda* was concerned to justify the use of a presumption that a statement has been coerced.

Moreover, the *Miranda* rules, as we noted earlier, are prophylactic standards that are not themselves mandated by the Constitution. Since the Constitution itself does not require the use of these standards, their justification must rest on the judgment that their benefits—the gains to constitutional values that result from the use of the standards—outweigh the costs. See *Michigan* v. *Tucker*, *supra*, 417 U.S. at 450-451; *Harris* v. *New York*, 401 U.S. 222, 224-225 (1971).

The costs of applying *Miranda* to questioning incident to an arrest are substantial. Perhaps the most obvious cost is that if the arresting officers fail to give the proper warnings, highly probative evidence may be suppressed even though it is not, in fact, compelled testimony the use of which would violate the Fifth Amendment. That is what seems to have happened here.

In addition, many suspects are, as we noted, willing to make statements for emotional or psychological reasons other than coercion, and the Constitution does not forbid the use of such statements. However effective *Miranda* warnings are in dispelling coercive influences, they will undoubtedly also discourage many such suspects from speaking voluntarily—thus damaging society's interest in effective law enforcement without any concomitant gain to constitutional values.

Requiring *Miranda* warnings to accompany questioning incident to an arrest will sometimes have the additional cost of placing officers who are making an arrest in a difficult dilemma. In this case, for example, if Officer Kraft had advised respondent of his right to remain silent, respondent might have refused to disclose the loca-

tion of the gun; or, at least, so Officer Kraft might have concluded in the moments before he asked the question. Thus, if the approach of the court below prevails, arresting officers will sometimes be forced to choose between rendering evidence inadmissible and taking the risk that, by giving *Miranda* warnings, they will interfere with their own ability to complete an arrest quickly and safely. To place an officer in the position of having to make this choice, at a volatile and potentially dangerous arrest scene, is itself a considerable cost.

If these costs were offset by substantial benefits to the values protected by the Self-Incrimination Clause, they might be worth incurring. But as we have explained, the likelihood is small that questioning incident to an arrest will actually produce coercion of the kind that *Miranda* warnings are effective in dispelling. Nor does it compromise the clarity of the *Miranda* rules to treat questioning incident to an arrest differently from other forms of questioning. There is, accordingly, no justification for extending *Miranda* to questions asked incident to an arrest.

Miranda can be seen as a response to a situation, perceived by the Court, in which police officers routinely short-circuited the elaborate protections that are afforded to the privilege against self-incrimination at trial; they did so by conducting a prior, incommunicado "proceeding," featuring none of the safeguards associated with a trial, in which the accused would be coerced into giving testimonial evidence against himself. See, *e.g.*, 384 U.S. at 466, quoting *Mapp* v. *Ohio*, 367 U.S. 643, 685 (1961) (Harlan, J., dissenting); *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 240 (1973). The *Miranda* Court sought to control this extra-judicial proceeding—"the secret interrogation process" (384 U.S. at 470)—in order to protect the privilege against self-incrimination. See *id.* at 481.

Questioning like Officer Kraft's, conducted incident to an arrest, is in no sense part of such an incommunicado "proceeding" designed to elicit involuntary testimony. It is not part of an "interrogation process" at all; it is part

of the quite different process of effecting an arrest. The *Miranda* rules were simply not intended to be applied to that process. The extraordinary result reached by the Court of Appeals in this case—a result linked so tenuously to the privilege against compelled self-incrimination—excellently illustrates this point.

3. As we have shown, the Court of Appeals' holding is the product of an excessively rigid and formalistic application of *Miranda* to questioning conducted incident to an arrest. But the mischievous consequences of such an approach may not be confined to post-arrest questioning. If the Court of Appeals' facile equation of Fourth Amendment seizures with *Miranda* custody is correct, it will logically be difficult to escape the further conclusion that questioning during an investigative stop based on reasonable suspicion (see *Terry* v. *Ohio*, 392 U.S. 1 (1968)) must also be preceded by *Miranda* warnings. A *Terry* stop, like an arrest, is a seizure within the meaning of the Fourth Amendment. See 392 U.S. at 16. An officer subjecting a person to a *Terry* stop undoubtedly "deprive[s the suspect] of his freedom of action" (*Miranda*, 384 U.S. at 444); indeed, he may do so by force. *United States* v. *Place*, No. 81-1617 (June 20, 1983), slip op. 6. In fact, from the point of view of the suspect, a *Terry* stop may often be indistinguishable from the initial stages of an arrest.

Yet to require *Miranda* warnings before the questioning that accompanies a lawful *Terry* stop would, we submit, be manifestly inappropriate. The usual purpose of a *Terry* stop is precisely to obtain information from the suspicious individual. See *Adams* v. *Williams*, 407 U.S. 143, 146 (1972); *Michigan* v. *Summers*, 452 U.S. 692, 700 n.12 (1981). If the officer must begin his interview with the suspect by giving him warnings calculated to discourage him from speaking, the principal purpose of the stop will be defeated.[6] Moreover, because of the "brief

[6] As the Seventh Circuit has noted, requiring *Miranda* warnings at an investigative stop "would contravene the very purpose of the investigatory *Terry*-type stop which is to 'allow the officer to con-

and narrowly circumscribed" nature of the questioning that accompanies a *Terry* stop (*Dunaway* v. *New York*, 442 U.S. 200, 212 (1979)) such a stop "is not likely to have coercive aspects likely to induce self-incrimination" (*Michigan* v. *Summers*, *supra*, 452 U.S. at 702 n.15). This is true for precisely the same reason that questioning incident to an arrest is unlikely to produce such coercion.[6]

This Court has not had occasion to decide whether *Miranda* warnings must precede questioning during a *Terry* stop, but its opinions clearly have not envisioned that warnings would be given in such circumstances. For example, in *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 881-882 (1975), the Court stated: "[W]e hold that when an officer's observations lead him reasonably to suspect that a particular vehicle may contain aliens who are illegally in the country, he may stop the car briefly and investigate the circumstances that provoke suspicion. * * * The officer may question the driver and passengers about their citizenship and immigration status, and he may ask them to explain suspicious circumstances * * *." Plainly the Court did not contemplate that, in every case, such

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firm or deny [his] suspicions by reasonable questioning, rather than forcing in each instance the "all or nothing" choice between arrest and inaction.'" *United States* v. *Jimenez*, *supra*, 602 F.2d at 143, quoting *United States* v. *Hickman*, 523 F.2d 323, 327 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976). See also *Podlaski* v. *Butterworth*, 677 F.2d 8, 10 (1st Cir. 1982): "One of the primary purposes of preliminary questioning is to separate a group of persons possibly involved in a crime into those who should and those who should not be arrested—to decide whether all, some, or none should be charged. To turn all such questioning into custodial interrogation, requiring *Miranda* warnings in all cases * * * could * * * seriously interfere with the process of information gathering and on occasion force the police to cast their net of arrest too wide, significantly interfering with the liberty of the innocent."

[6] The *Miranda* opinion itself recognized the distinction between the incommunicado stationhouse questioning with which it was principally concerned and "[g]eneral on-the-scene questioning as to facts surrounding a crime" (384 U.S. at 477).

questioning would have to be preceded by *Miranda* warnings. Similarly, in *United States* v. *Cortez*, 449 U.S. 411 (1981), officers stopped a vehicle on reasonable suspicion for the "purpose [of] * * * question[ing] the occupants of the vehicle about their citizenship and immigration status and the reasons for" their suspicious activity. *Id.* at 421. While the validity of the questioning was not at issue in *Cortez*, the Court surely would have rejected any contention that evidence discovered as a result of the questioning was inadmissible because the questioning was not accompanied by *Miranda* warnings. In *United States* v. *Martinez-Fuerte*, 428 U.S. 543 (1976), the Court held that Border Patrol agents may, without particularized suspicion, seize persons briefly at fixed checkpoints and inquire about their "citizenship and immigration status" (*id.* at 546). Again, it seems clear that the Court did not envision that such an inquiry would have to be preceded by *Miranda* warnings.

The courts of appeals have struggled to reconcile the apparent requirement that *Miranda* warnings be given whenever a suspect is in custody with their shared sense that warnings are inappropriate when the "custody" takes the form of a *Terry* stop. Some courts have simply held that *Miranda* warnings are not required before questioning that occurs during a lawful *Terry* stop. See, *e.g.*, *United States* v. *Collom*, 614 F.2d 624, 628 (9th Cir. 1979), cert. denied, 446 U.S. 923 (1980); *United States* v. *Jones*, 543 F.2d 1171, 1173 (5th Cir. 1976), cert. denied, 430 U.S. 957 (1977) (questioning about suspect's destination permitted during a *Terry* stop of his car); *United States* v. *Hickman*, 523 F.2d 323, 326-327 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976). See also *United States* v. *Rice*, 652 F.2d 521, 527 (5th Cir. 1981); *United States* v. *Blum*, 614 F.2d 537, 540 (6th Cir. 1980).

Other courts dealing with situations that resemble *Terry* stops appear to have analyzed the question whether *Miranda* warnings were required by deciding whether all the circumstances taken together created a coercive situa-

tion. See, *e.g.*, *Podlaski v. Butterworth*, 677 F.2d 8, 10 (1st Cir. 1982); *United States* v. *Grady*, 665 F.2d 831, 833-834 (8th Cir. 1981) (suspect was not "in the type of custodial surroundings which concerned the *Miranda* court"); *United States* v. *Harris*, *supra*, 611 F.2d at 172-173; *United States* v. *Jimenez*, *supra*, 602 F.2d at 144 & n.5, 146 ("The extent to which *Miranda* applies to street encounters or car stops depends on whether these encounters reflect the type of inherently coercive tactics that may often attend a station-house interrogation"); *United States* v. *Harris*, 528 F.2d 914 (4th Cir. 1975), cert. denied, 423 U.S. 1075 (1976). See also *Borodine* v. *Douzanis*, 592 F.2d 1202, 1205-1208 (1st Cir. 1979); *United States* v. *Barnes*, 464 F.2d 828, 829-830 (D.C. Cir. 1972), cert. denied, 410 U.S. 986 (1973).

These decisions of the courts of appeals are important for two reasons. First, they demonstrate the prevalance of the view that it would be inappropriate to require that *Miranda* warnings must precede brief, on-the-scene questioning, even if the suspect is "in custody" in the sense that he is not free to leave. As we noted, this Court's opinions dealing with investigative stops appear to reflect the same implicit assumption. And for the reasons we have given, questioning during a *Terry* stop and questioning incident to an arrest are generally indistinguishable insofar as their potential to create coercion is concerned; even the suspect will often be unable to distinguish between them.

Second, in order to avoid the incongruous result of requiring *Miranda* warnings during brief, on-the-scene questioning merely because the suspect was under restraint, the courts of appeals have frequently resorted to ad hoc balancing based on the facts of particular cases. The *Miranda* rules would be made more, not less, clear by explicitly recognizing that not every Fourth Amendment "seizure" creates "custody" for *Miranda* purposes, and specifically that questioning incident to an arrest or during a *Terry* stop need not be preceded by warnings.

II. NONTESTIMONIAL EVIDENCE DERIVED FROM RESPONDENT'S STATEMENT IS ADMISSIBLE AGAINST HIM EVEN IF THAT STATEMENT WAS OBTAINED IN VIOLATION OF *MIRANDA*

If, contrary to our submission, Officer Kraft was required to give respondent *Miranda* warnings before asking the location of the gun, respondent's answer cannot be used as evidence against him. But the Court of Appeals also assumed, without discussion, that the gun would itself also have to be suppressed, so that it could not be used as evidence even if the State independently linked it to respondent. That conclusion by no means follows.

A. As this Court has noted, the question whether nontestimonial fruits of a *Miranda* violation can be used as evidence against an accused has not been resolved. See *Michigan* v. *Tucker*, *supra*, 417 U.S. at 446. We addressed this question at length in the Brief for the United States as Amicus Curiae in *Michigan* v. *Tucker* (No. 73-482),[7] and we merely summarize here the argument we made in that brief.

1. The Fifth Amendment does not prohibit the government from compelling an accused to give evidence against himself; it prohibits only compelled *testimony*. It is well established that the government may require an accused to take actions that will create nontestimonial evidence that can be used against him. See, *e.g.*, *United States* v. *Dionisio*, 410 U.S. 1, 5-7 (1973); *Gilbert* v. *California*, 388 U.S. 263, 266-267 (1967); *United States* v. *Wade*, 388 U.S. 218, 222-223 (1967); *Schmerber* v. *California*, 384 U.S. 757, 760-765 (1966). It is, of course, clear that the gun in this case is nontestimonial evidence.

We do not dispute, however, that if the gun were discovered as the result of what is shown to have been in fact a compelled statement by respondent, it could not be used as evidence against him. *Counselman* v. *Hitchcock*, 142 U.S. 547 (1892), held that the privilege against self-incrimination prohibits the use not only of compelled

[7] Copies of that brief have been sent to the parties.

statements but of evidence derived from compelled statements.[8] *Counselman* involved a statement compelled by the threat of punishment for contempt, but we would agree that nontestimonial evidence derived from a statement that has been compelled by police interrogation practices that overbear the will of a suspect (see, *e.g.*, *Mincey* v. *Arizona*, 437 U.S. 385, 396-402 (1978)) should also not be admitted into evidence. See *Michigan* v. *Tucker*, *supra*, 417 U.S. at 461 (White, J., concurring).

But the Court of Appeals did not suggest that respondent's statement was compelled either by threat of punishment for contempt or by abusive police practices. The gun is nontestimonial evidence derived not from a statement shown to be compelled but from a statement obtained (we assume arguendo) in violation of the prophylactic rules of *Miranda*—rules that preclude the use of many statements that are not themselves in fact compelled. When nontestimonial evidence is directly linked to *compelled* statements, it is plausible to say that the values underlying the Self-Incrimination Clause would be offended by the use of the nontestimonial evidence; but here, the nexus is between the nontestimonial evidence and testimony not shown to be compelled but merely induced in circumstances giving rise to the possibility that unprovable compulsion may have occurred. For this reason, the gun resembles nontestimonial evidence obtained from a suspect without compelling a statement, and the values underlying the Self-Incrimination Clause do not require its suppression, any more than they would require the suppression of other such nontestimonial evidence.

2. In *Murphy* v. *Waterfront Commission*, 378 U.S. 52

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[8] As we noted in our brief in *Michigan* v. *Tucker* (at 23-30), the *Counselman* opinion is vulnerable to criticism. An additional reason not to exclude nontestimonial fruits of a *Miranda* violation is that the arguably unsound rule of *Counselman* should not be extended beyond its own context—statements directly compelled by threat of punishment for contempt—in the absence of a strong showing that such an extension is needed to further the purposes of the Self-Incrimination Clause.

(1964), the Court explained the values underlying the Self-Incrimination Clause in specific terms; this explanation further suggests that the admission of the gun in this case would not be inconsistent with those values. For example, the Court referred to the "distrust of self-deprecatory statements" and suggested that there is never sufficient assurance that a compelled confession is truthful. *Id.* at 55. See also *Miranda*, 384 U.S. at 455 n.24, 470; H. Friendly, *Benchmarks* 282 (1967) ("the truly dreadful risk of the false confession"). In holding that *Miranda* does not apply retroactively, the Court has stated that voluntary statements obtained in violation of *Miranda* do not present the same danger of an unreliable or false confession. *Johnson* v. *New Jersey*, *supra*, 384 U.S. at 730. More important, however, when only non-testimonial fruits of a statement are admitted in evidence —and must be independently linked to the accused—there is simply no danger that a person will be convicted on the basis of an unreliable or false confession.

Similarly, the Court noted in *Murphy* that the privilege against self-incrimination "reflects * * * our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt" (378 U.S. at 55). A suspect who is informally questioned by the police (unlike, for example, a grand jury witness) does not face this trilemma; he may remain silent without penalty, and even a false statement probably would not subject him to punishment. Finally, the Court in *Murphy* stressed the extent to which authorities armed with inquisitorial powers can violate citizens' privacy with their demands for self-accusation. See *ibid.* But in the context governed by the *Miranda* exclusionary rule—custodial interrogation—other constitutional provisions protect these privacy values. Specifically, under the Fourth Amendment, the authorities cannot subject any person to custodial interrogation unless they have probable cause to suspect him of a crime. The Fourth Amendment exclusionary rule enforces that prohibition. See *Dunaway* v. *New*

York, *supra*; *Brown* v. *Illinois*, *supra*. It is therefore unnecessary to extend the *Miranda* exclusionary rule to probative, reliable, nontestimonial evidence not directly linked to any actually compelled statement.

B. Even if nontestimonial evidence derived through exploitation of a *Miranda* violation ordinarily must be suppressed, an "inevitable discovery" rule should be applied to such evidence. That is, evidence that the authorities would have uncovered in any event, even if they had not obtained statements in violation of *Miranda*, should not be excluded. See *Government of the Virgin Islands* v. *Gereau*, 502 F.2d 914, 927-928 (3d Cir. 1974), cert. denied, 420 U.S. 909 (1975). We have discussed the "inevitable discovery" doctrine at length in the Brief for the United States as Amicus Curiae in *Nix* v. *Williams*, cert. granted, No. 82-1651 (May 31, 1983),[9] and no purpose would be served by repeating that discussion here.

This Court has held that the privilege against self-incrimination is fully protected when the government shows an independent source for evidence it could also have derived from a compelled statement. *Kastigar* v. *United States*, 406 U.S. 441, 459-462 (1972). As we explain in our brief in *Nix*, the "inevitable discovery" exception to the exclusionary rule is logically related to, and follows directly from, the "independent source" exception. When the government shows that it would have obtained evidence even if the accused had not spoken, there is no sense in which the accused is being made " 'the deluded instrument of his own conviction.' " *Culombe* v. *Connecticut*, 367 U.S. 568, 581 (1961) (opinion of Frankfurter, J.) (citation omitted). Moreover, *Kastigar* applied the "independent source" rule to statements that had been compelled in the clearest sense—by the threat of punishment for contempt. As we have said above, statements obtained in violation of *Miranda* cannot be equated to statements obtained through such compulsion. We also explained in our brief in *Nix* why the "inevitable dis-

[9] We have sent copies of this brief to the parties.

covery" rule does not weaken the deterrent effect of an exclusionary rule.[10]

CONCLUSION

The judgment of the Court of Appeals of New York should be reversed.

Respectfully submitted.

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[10] Although the lower courts made no findings of fact on the subject, this seems clearly to be an appropriate case in which to apply the "inevitable discovery" rule. Had respondent not spoken, the officers undoubtedly would have searched for the gun. The gun was apparently quite near the scene of the arrest, presumably having been hidden during the few seconds when respondent eluded Officer Kraft, and there is no indication that the gun was particularly well concealed in the cartons. It is thus virtually inconceivable that the gun would not have been found, and it seems quite unreasonable to confer on respondent the windfall of suppressing the gun simply because of the essentially immaterial mistake of the officer in asking a spontaneous question about its location.

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